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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-66

PAT HALL AND BOBBY JAMES LAWSON,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

Page

Question Presented 1

Statement of the Case 2

Reasons for Denying the Writ

A. Petitioners have no standing to challenge the Georgia wiretap statute 3

B. Petitioners have alleged no harm by the introduction of evidence obtained in the wiretap 4

C. Georgia courts hold that the Federal statute is the controlling statute and the Federal statute was complied with in this case 5

Conclusion 11

Certificate of Service 12

TABLE OF AUTHORITIES

Page

Broderick v. Oklahoma, 413 U.S. 601 (1973) 4

Cross v. State, 225 Ga. 760, 171 S.E. 2d 507 (1969) 7, 8

Granese v. State, 232 Ga. 193, 206 S.E. 2d 26 (1974) 8

Harrington v. California, 395 U.S. 250 (1969) 4

Lawson v. State, 236 Ga. 770, ____ S.E. 2d ____ (1976) 2, 9, 10

Orkin v. State, 236 Ga. 176, ____ S.E. 2d ____ (1976) 8

Schneble v. Florida, 405 U.S. 427 (1972) 4

United States v. Falcone, 364 F. Supp. 877 (D. N.J. 1973), aff'd, 500 F. 2d 1401 (3d Cir. 1973) 10

Page

United States v. Iannelli, 477 F. 2d 999 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975) 10

United States v. Pacheco, 489 F. 2d 2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) . . . 9

STATUTES CITED

Georgia Code Chapter 26-20 (Sections 26-2001 through 2011) 5

Georgia Code Ann. § 26-3004..1, 2, 6, 7, 8

Georgia Laws 1967, pp. 844-852 5

Georgia Laws 1968, pp. 1249, 1328 6

Georgia Laws 1972, pp. 615, 952-953 . . 6

18 U.S.C. §§ 2510-2520 1

18 U.S.C. § 2516(2) 7, 9

18 U.S.C. §§ 2518(4)(c), (5), (6) . 7, 10

Title III, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 211-225, Chapter 119 of Title 18, United States Code . .5, 6, 7, 8, 10

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QUESTION PRESENTED

Is the Georgia court-authorized wiretap statute, Ga. Code Ann. § 26-3004, which was enacted prior to the enactment of its Federal counterpart, 18 U.S.C. §§ 2510-2520, and which does not contain some of the requirements of the Federal statute, unconstitutional when the Georgia Supreme Court has consistently held that the provisions of the Federal wiretap statute are controlling and when in Petitioners' case, all of the requirements of the Federal statute were substantially complied with?

STATEMENT OF THE CASE

Petitioners Lawson and Hall were convicted in a non-jury trial in the Fayette County Superior Court, Georgia, of two counts of communicating gambling information. Each Petitioner was sentenced to two five-year terms, with the sentences to run concurrently.

Petitioners appealed to the Georgia Supreme Court and alleged that the Georgia wiretap statute, Ga. Code Ann. § 26-3004, was unconstitutional. In a unanimous decision, the Georgia Supreme Court affirmed the conviction on April 20, 1976, and denied rehearing on May 4, 1976. See Lawson v. State, 236 Ga. 770, ____ S.E. 2d ____ (1976).

REASONS FOR DENYING THE WRIT

A. PETITIONERS HAVE NO STANDING TO CHALLENGE THE GEORGIA WIRETAP STATUTE.

In their brief, Petitioners allege the Georgia wiretap statute is unconstitutional because it allegedly (1) requires no full statement as to why alternative procedures cannot be used, (2) requires no full statement concerning previous applications for the wiretap, (3) allows law enforcement officers to use derivative evidence without subsequent judicial authorization, and (4) does not require prompt notice to persons named in the court order that they have been subject to a wiretap.

Petitioners have not alleged that any of these alleged erroneous practices took place in their case or that the statute was unconstitutionally applied to them. Therefore, Petitioners have no standing to challenge the Georgia statute. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge

that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broderick v. Oklahoma, 413 U.S. 601, 610 (1973).

B. PETITIONERS HAVE ALLEGED NO HARM BY THE INTRODUCTION OF EVIDENCE OBTAINED IN THE WIRETAP.

In their brief, Petitioners state, "The great flaw in Georgia's statute is that it provides the police with too much possibility [emphasis added] for abuse . . . of wiretaps." (Petitioners' Brief p. 8). Nowhere in their brief do Petitioners allege any abuse that occurred or what harm, if any, they suffered by the introduction of evidence obtained in the wiretap. Even if the evidence were illegally admitted, harm as well as error is required before reversal would be mandated. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969).

C. GEORGIA COURTS HOLD THAT THE FEDERAL STATUTE IS THE CONTROLLING STATUTE AND THE FEDERAL STATUTE WAS COMPLIED WITH IN THIS CASE.

Respondent frankly concedes that in a number of respects the Georgia statute governing court-authorized wiretaps does not track the provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 211-225, Chapter 119 of Title 18, United States Code (hereinafter referred to as "Title III" for brevity). However, there is a logical reason why it does not. The General Assembly of Georgia enacted, effective April 19, 1967 an Act entitled "Eavesdropping, Peeping Tom and Invasion of Privacy." See Georgia Laws 1967, pp. 844-852. The Act struck in its entirety former Georgia Code Chapter 26-20 and inserted Sections 26-2001 through 2011 in lieu thereof. In general, the Act made it a felony, among other prohibited eavesdropping acts, to intercept the contents of a message sent by telephone, telegraph, letter or other means of private communication. However, Section 26-2005 contained an exception as to law enforcement officers acting pursuant to court order in the investigation of certain enumerated crimes. Former Section 26-2005(c).

It should be noted that this statute was enacted prior to the enactment of Title III, which became effective more than a year later on June 19, 1968. Therefore, there was no effective way in which the Georgia General Assembly could conform its wiretapping exception for law enforcement officers to a proposed Federal statute not yet enacted or approved in final form.

The next year, on April 10, 1968, the Georgia General Assembly enacted an entirely new, revised and updated Criminal Code of Georgia, to become effective on July 1, 1969. Georgia Laws 1968, pp. 1249, 1328. As a part of this new Code, Section 26-2005, relating to court-authorized wiretapping, was reenacted verbatim as Section 26-3004. This re-codification also occurred prior to the effective date of Title III. This Section is the one under attack as being unconstitutional in the instant petition.

Certain minor amendments not pertinent to the issues here were enacted in 1972. Georgia Laws 1972, pp. 615, 952-953.

Generally, the Georgia statute's lack of conformity to certain parts of Title III consists of omissions of certain Federal requirements. For example, the Georgia statute does not require the interception

order to contain the minimization directions required by 18 U.S.C. 2518(5). However no portions of Ga. Code Ann. § 26-3004 are constitutionally repugnant to Title III.

The failure of the Georgia statute to closely conform to certain portions of Title III does not render it unconstitutional, however, because of the decisions of the Georgia Appellate Courts which apply the requirements of Title III to State wiretap investigations, applications and court orders.

In the first appeal arising from a court-authorized wiretap conducted under State law to reach the Supreme Court of Georgia, the order authorizing the wiretap and the renewal order failed to include the Federal provisions that they be executed as soon as practicable; failed to state whether interceptions should terminate when the described communication was first obtained; failed to direct that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception; and failed to direct that the interception must terminate upon attainment of the authorized objective. There are requirements of 18 U.S.C. 2518(4)(e) and (5) but are not required by Ga. Code Ann. § 26-3004. The Supreme Court of Georgia said in that case, Cross v. State, 225 Ga. 760, 767, 171 S.E. 2d 507 (1969), that the failure of the order to include the foregoing directions "requires a reversal of the verdicts of guilty and

judgments of convictions because of the failure of the court to exclude evidence thus illegally obtained in violation of those provisions of the Federal Act."

Cross, supra, a unanimous decision of the Georgia Supreme Court, which has not been modified, overruled or distinguished to date, shows conclusively that the highest court of the State of Georgia recognizes the controlling authority of Title III and will reverse state court convictions arising from wiretaps not obtained in full compliance with that Federal statute, even though Ga. Code Ann. § 26-3004 may not have exactly the same requirements.

More recent decisions of the Georgia Supreme Court also recognize the controlling effect of Title III in State-conducted wiretaps. In Granese v. State, 232 Ga. 193, 196, 206 S.E. 2d 26 (1974), that Court said, "Our Georgia statute is supplementary of the Federal statute." In Orkin v. State, 236 Ga. 176, 179, ____ S.E. 2d ____ (1976), the Georgia Supreme Court reiterated that the requirements of both federal and state law regarding wiretapping must be satisfied where applicable.

It is obvious that a state wiretapping statute does not have to literally rephrase the Federal statute. A Florida statute authorizing the Governor to authorize an initial application was held not to violate the Federal statute authorizing the "principal prosecuting attorney" to make application. United States v. Pacheco, 489 F. 2d 554, 562-63 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); see 18 U.S.C. § 2516(2). The state statute may implement and supplement the Federal statute, as Georgia's has done. While there are differences between the Georgia statute and the Federal statute, these differences are not material; and the Georgia statute complies with the intent and substance of the Federal statute.

The record clearly shows that the requirements of the Federal statute were complied with in Petitioner's case.

(1) Though authorized for 20 days, the court-authorized interceptions were terminated after two days. Lawson v. State, supra at 772.

(2) Other investigative methods would have been futile. Lawson v. State at 771.

(3) Through service of the search warrants and affidavits detailing wiretapped conversations, Petitioners had actual notice five days after the termination of the wiretaps. Trial Transcript 354-359.

(4) The court was notified of prior wiretaps. Lawson v. State at 772; Trial Transcript 71.

The one provision of Title III not duplicated in the Georgia statute which was not complied with in this case was the discretionary authority of the Court to require progress reports, authorized by 18 U.S.C. 2518(6). However, a Federal Judge may dispense with progress reports entirely. United States v. Iannelli, 477 F. 2d 999 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975); United States v. Falcone, 364 F. Supp. 877 (D. N.J. 1973), aff'd, 500 F. 2d 1401 (3d Cir. 1974). In Petitioners' case, even had the Superior Court Judge required progress reports, the voluntary termination of interceptions after two days would no doubt have preceded the first reporting date.

In summary, the Petitioners' telephones were wiretapped precisely as they would have been if it had been a federal investigation under authority of an interception order signed by a United States District Judge. Petitioners were deprived of none of the statutory or constitutional safeguards of Title III.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard L. Chambers, Attorney of Record for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three copies of the foregoing Brief for Respondent in Opposition upon the petitioners by depositing copies of same in the United States mail, with proper address and adequate postage thereon to:

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This 5th day of August, 1976.

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